

(2013) 10 DEL CK 0030
Delhi High Court
Case No: LPA No. 582 of 2003

Parasrampuria
Synthetics Ltd.

APPELLANT

Vs

UOI and Another

RESPONDENT

Date of Decision: Oct. 10, 2013

Hon'ble Judges: S. Ravindra Bhat, J; Najmi Waziri, J

Bench: Division Bench

Advocate: J.P. Singh, Mr. L.K. Giri, Mr. Sumeet and Ms. Ankita, for the Appellant;

Final Decision: Dismissed

Judgement

Najmi Waziri, J.

In this appeal, the appellant has challenged the order of the learned Single Judge dated 9th May, 2003 in CWP No. 6972/2001. Vide the impugned judgment, the learned Single Judge had rejected the prayer of the appellant seeking: (i) a direction that only the rate of exchange as prevailing on the date of issue of licence under the EPCG Scheme (licence no. P/CG/2127854/S/WP/19/H/90/CG1/LS dated 18th March, 1991) be used for the purpose of computing the export obligation, as provided in the import exchange policy and in the Handbook of Procedures; (ii) issuance of a direction to the respondent/Government to accept the statement of exports purported to be in fulfilment of the petitioner's export obligation in respect of the aforesaid licence; and (iii) quashing of the respondent's communication dated 23rd October, 2001 requiring the appellant/petitioner to re-submit the statement of exports expressing the fulfilment of their export obligation apropos the said license and also to quash the public notice No. 153-ITC (PN) 90-93, dated 16th May, 1991.

2. The facts of the case are that under para 197 of the EXIM policy 1990-93 (which was given force through guidelines of 26th December, 1990 issued under REP Circular No. 38/90), a license could be sought for by importers of certain capital goods for importing such goods under concessional rate of duty, subject to certain terms and conditions. One of these conditions was that the importer would comply

with the requirement to export goods for a value equivalent to thrice that of the value of the capital goods imported.

3. Under the above policy, the appellant sought for and was granted permission to import certain machinery at a concessional rate of duty of 25 per cent of the CIF value of the license, which was INR 7,58,94,400/- (DM 63,92,202/-). The license, issued under EPCG Scheme, cast upon the licensee an export obligation equivalent to three times the CIF value of the license. The time for fulfilment of the export obligation started from the first date of import i.e. 26th September, 1991, which was about six months before the import license was granted. On the reverse of the said license, the following obligation was stipulated:

- 1) This licence has been issued under para 197 of import export policy 1990-93 Vol. I and carries an obligation to export Polyester Filament Yarn (Item of Export).
- 2) The additional value of export obligation to be fulfilled by the firm is US\$11,600,459/- (Three times of the CIF value).

(Emphasis supplied)

4. The learned senior counsel for the appellant argued that per the terms of the import license, the applicant/appellant was required to furnish an indemnity-cum-surety bond. This was duly complied with. It has been duly undertaken by the appellant - in the said bond - that it would export the equivalent of Rs. 28,07,83,760/-, which amount calculates to three times the CIF value of imported capital goods. The relevant portion of the said bond records as under:

Whereas the Government has permitted the said importer to import Melting Extruder of Barmag type and other items as per detailed list attached, and has agreed to issue the import licence for the said melting Extruder of Barmag type and other items as per detailed list attached under the aforesaid notification of the Government of India, read with the Import and Export Policy 1990-93 (Vol. 1) and the Handbook of Procedures, 1990-93 (Vol. 1) and has also granted licence No. P/CG/2127854 dated 18th March, 1991 for a value of Rs. 7,58,94,400/- (DM 6,392,202) for the import of said Melting Extruder of Barmag type and other items as per detailed list attached on the terms and conditions specified therein, read with the terms and conditions specified in the aforesaid Notification and the Import Policy Procedures issued by the Government of India and the Chief Control of Imports and Exports, respectively.

That the Importer further irrevocably undertakes and guarantees that, in the event of the importer's default in meeting the export obligation set out in the aforesaid notification issued by the Ministry of Finance and the said Import Policy and the Handbook of Procedures issued by the Chief Controller of Imports and Exports, in full or part, or in the event of importers failure to perform the terms and conditions specified in the licence to import Melting Extruder of Barmag type of other items as

per detailed list attached or under the provisions of the import and export (Control) Act, 1947, or rules framed thereunder, as also including the conditions specified above or if the above named importer is not able to furnish any information required by the Chief Controller of Imports and Exports under the aforesaid notification, the Import Policy and Hand book of procedures issued by the Chief Controller of Imports and Exports or if there is any other failure of any kind whatsoever for which the decision of the Government shall be final, in such events an amount equal to Rs. 28,07,83,760/- (Rupees Twenty eight crores seven lakh eighty three thousand seven hundred and sixty only) (this includes the amount equal to three times the CIF value of imported capital goods plus the difference between the normal rate of customs duty and the concessional rate of customs duty as specified in the Ministry of Finance, Department of Revenue Notification No. 169/90-Customs dated 3.5.1990) be demanded by the Government in whole or in part and on written demand of the Government, the Importer shall without demur pay to the Government or to any officer so authorised by the Government so demanded.

5. The learned counsel for the appellant further argued that the equivalent of three times CIF value was exported by them as per the (then) current exchange rate, whereas the respondent had computed the exchange rate at the value frozen on the date when the license was issued. This, according to the learned counsel for the appellant, was in contravention of the respondents own clarifications and amendment to the policies made after the issuance of the license. Counsel contended that by amendment to the policy dated 28th May, 1998 (vide policy circular No. 8 (RE-98)/98-99), it was provided inter alia that: "the export proceeds realized in any currency shall be converted, except in cases where the entire imports and the exports are made in one foreign currency, into US Dollar at the exchange rate prevailing on the date of issuance of EPCG license which has been endorsed on the reverse of the license with a view to ascertain whether export obligation has been fulfilled or not." This, the appellant submits, makes it abundantly clear that for the purpose of calculation of the quantum of export obligation, the exchange rate prevailing on the date of issuance of EPCG license has to be taken as the basis. The appellants represented to the respondent that they had fulfilled the export obligation and gave their calculations through letter dated 15th July, 1994 claiming that their export obligation came to US \$87,301,80/- and further contended that the export obligation imposed upon them was in excess by US\$28,70,279/-. To this, the respondent by letter dated 14th September, 1994 replied that: (i) the request for correction and export obligation had been duly considered and it had been verified that the export obligation had been correctly calculated at the exchange rate of Rs. 100 = DM 8.4225 = US \$24894; and (ii) that the request for reduction in EO on account of exchange rate fluctuations between the time of issue of license and its endorsement under the EPCG scheme was not found acceptable, because the exchange rates indicated on the license were taken into consideration for all

purposes.

6. The rate and the manner at which the appellant calculated their export obligation is as under:-

7. Counsel for the appellant submitted that because of the fluctuation in foreign exchange rates, the burden of increase or decrease in the rupee value of a fully convertible currency has to be borne by the exporter. Insofar as the licensee/importer has brought into the country foreign exchange by exporting goods equivalent to three times the prevailing value of the foreign currency indicated in the import licence, he would have duly complied with the said obligation. It would therefore be unfair and unreasonably onerous upon the exporter to further suffer the consequences of a depreciating foreign currency to his detriment. Counsel further contended that the exchange rate prevalent at the issuance of licences would necessarily have to be taken as fixed since otherwise it would be impossible for the exporter to know the extent of their obligations in view of the fluctuations in foreign currency markets. He further contended that the Government's stand to benefit twice over i.e. in terms of the rupee obligation as specifically mentioned in the license and also the amount of foreign exchange which has been earned by virtue of the exports.

8. Although none appeared on behalf of the respondent, Union of India, when the matter was heard, this Court notices that a Counter Affidavit has been filed by the respondent wherein, inter alia, the following contentions had been made opposing the appeal:

i. The appellant has not levelled any challenge to the procedure or the policy of the respondent, but has only sought that this Court interprets it based on what is its alleged intent.

ii. The export obligation as noted on the license is calculated based on Public Notice No. 158-ITC(PN)/1990-90 dated 16th May, 1991, which requires it to be the CIF value of the license at the rate of exchange on the date of issue of license.

iii. The said export obligation was to be fulfilled in USD, as noted on the license.

iv. Policy Circular No. 8 dated 28th May, 1998, provides that export proceeds realised in any currency shall be converted to USD. Consequently, the same cannot apply to proceeds realised in USD.

v. Appellant is attempting to mislead the court by indicating the value of exports in INR value of foreign currencies at the rate on the date of export (instead of the rate on the date of the license) and taking advantage of devalued INR.

vi. Even the procedure for debiting imports as per the Handbook of Procedure provides that the export obligation shall be discharged in freely convertible foreign currency.

9. This Court notices that the learned Single Judge had taken into consideration the contentions of the parties and in a detailed judgment has observed as under:-

9). I have considered the submissions of both the parties. At the outset, it may be highlighted that the export obligation in the licence dated 18th March, 1991, as amended on 3rd February, 1992 is stated in US\$ i.e. US \$ 11,600,459. No equivalent value in rupees is stated. The intention, therefore, was clear, namely, the petitioner was to fulfil the export obligation of the aforesaid value in dollars. The petitioner has relied upon two licences at pages 135 and 137 to contend that the respondents were normally mentioning the value in rupees as well. The very fact that in certain licences value was mentioned in rupees and it was specifically omitted in the case of the petitioner would be a factor which would rather go against the petitioner viz. In so far as licence dated 18th March, 1991 issued in favour of the petitioner is concerned, export obligation was to be discharged in US \$ by specifically omitting the rupee equivalent thereof. Moreover, in the counter affidavit filed on behalf of the respondents, it is clarified that prior to 16th May, 1991 (to which period two licences at pages 135 and 137 belong) the value of export obligation under EPCG Scheme used to be mentioned in Indian rupees even though export obligation was to be completed in freely convertible foreign exchange currencies. However, consequent upon issuance of public notice No. 153-ITC (PN) 90-93; dated 16th May 1991 clarifying that EO under BPCG Scheme henceforth would be indicated in US \$, the practice was discontinued and the licences issued/endorsed under BPCG Scheme were being issued imposing Export Obligation in US \$ alone. Since this licence was endorsed under BPCG Scheme on 3rd February, 1992 value of export obligation was indicated in US \$. Further the stand of the respondents appears to be correct, namely, that as per the policy amendment, the licence was converted into BPCG licence which entitled the petitioner to import the machinery at concessional rate of custom duty. It was for this reason that export obligation was imposed on the petitioner for export of goods worth three times the CIF value of the licence. Calculating in this manner and converting the same into US \$ at the rate of foreign exchange prevailing on the date of issue of the licence export obligation in the sum of US \$ 11,600,459 was worked out. Therefore, at the time of issuance of the licences when the export obligation was to be calculated in terms of dollars, the exchange rate prevalent as on that date had to be applied. However, that does not mean that this exchange rate had to remain static even for the purpose of making exports. Once obligation of the petitioner to earn specific amount of foreign exchange is fixed, it is required to make exports of US \$ of that particular amount. For this purpose, the petitioner cannot reduce the obligation by converting the same at the exchange rate prevailing at the time of issuance of licences which would be negative of the concept of import and export. The petitioner has adopted a curious method to show the fulfilment of his export obligations as rightly pointed out by the respondents. It may be mentioned that even para 231 of the Handbook of Procedure which deals with procedure for debiting imports very categorically

stipulates that export obligation are to be discharged in freely convertible currency.

10. The petitioner is only relying upon the first part of the para where it is stipulated that import licence has to indicate the value both in rupees and in foreign currency at the exchange rate prevailing on the date of issue of the licence. However, even if that is to be done, in the later part of the same para it is categorically mentioned that export obligation has to be discharged in freely convertible currency. Therefore, even if rupee value of the export obligation had to be indicated in the licence, the obligation of the petitioner to make the exports of US value indicated in the licence had to continue.

10. This Court further notices that at that time, the procedure for debiting imports was duly notified in the Handbook of Procedure and was applicable to the appellants. It reads as under:-

231 Procedure for debiting imports: Import licences issued under various provisions of the Policy shall indicate the value both in Rupees and in foreign currency at the exchange rate prevailing on the date of issue of the licence. In the case of licences where export obligation is imposed, the value of the export obligation shall be indicated both in freely convertible currency and Indian Rupees equivalent thereof at the exchange rate prevailing on the date of issue of the licence, which exchange rate shall also be indicated on the licence. The value in Indian Rupees shall be indicated within brackets in the licence. The remittance of foreign exchange against the licence shall, however, be regulated in freely convertible currency, and no enhancement of Rupee value shall be necessary if the remittance of foreign exchange is covered by the value of licence shown in foreign currency. The export obligation shall also be discharged in freely convertible currency.

(Emphasis supplied)

11. In its counter affidavit the government has argued that by application of the current exchange rate, the appellant had sought to take undue benefit of the depreciating valuation of the Indian rupee. This was not permissible under the Scheme, which has specifically noted the value of the export obligation in US \$ i.e. US \$11,600,459/- (i.e. three times of the CIF value). The Government had specifically mentioned the export obligation in the foreign currency which was calculated on the basis of the US Dollar rate prevalent as of that date. Since the Government's scheme was to earn foreign exchange, it ensured that the export obligation was specifically mentioned in the requisite foreign currency. It is noteworthy that the export obligation is spread over a period of 4 to 8 years and conversion of export obligation based on exchange rate on the date of export i.e. after such a long period would be unreasonable in view of the sharp fluctuation in the currency values and continued depreciation of the Indian rupee vis-à-vis the US Dollar. This Court notices that the policy circular No. 8 (RE-98)/98-99, dated 28th May, 1998 was not applicable with retrospective effect especially for an export obligation for which the

last shipment was stated to have been made on 14th September, 1995. Therefore the appellant cannot claim any benefit under the said circular. Notably, in any case, the said circular also stipulated that the export proceeds realized in any currency would be converted into USD and the term "any currency" would refer to the foreign currency realized through exports, since the aim of the scheme was to promote foreign exchange earnings in fully convertible currency. Subsequent devaluation of the rupee cannot come to the aid of the appellant. In view of the preceding discussion, this Court finds none of the arguments on behalf of the appellant tenable. There is no merit in the appeal. There is no reason to interfere with the detailed reasoning of and conclusion arrived at by the learned Single Judge. Accordingly, the appeal is dismissed.